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No. 392

In the Supreme Court of the United States

October Term, 1947

TIGNER E. WOODS, REGIONAL EXPEDITER, OFFICE OF THE REGIONAL EXPEDITER,

Petitioner,

v.

CHARLES STONE,

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 392

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, PETITIONER

v.

CHARLES STONE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

This supplemental brief is prompted by the *amicus curiae* brief which has been filed in this case by Norma L. Comstock. The burden of that brief is that violation of a retroactive rent reduction order gives rise to no cause of action for damages under Section 205 (e) of the Emergency Price Control Act, and that the exclusive remedy for the failure or refusal of a landlord to refund excessive rent collected before the date of the order is a suit for restitution under Section 205 (a).

If there is no cause of action under Section 205 (e), there is, of course, no right at all to sue

for treble damages. That is a right which, under Section 205 (e), is, in the first instance, the tenant's.[1] And under the Housing and Rent Act of 1947 (Pub. L. No. 129, 80th Cong., 1st Sess., sec. 205) it is a right which is the tenant's alone. Hence there is a patent inconsistency between the *amicus'* repeated protestations of concern for the rights of tenants and the conclusion for which she contends.[2]

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[1] Even when the Expediter brings the suit for treble damages, his normal practice is to seek restitution of the amount of the overcharge for the tenant plus double damages, or, in the alternative, full treble damages if the court does not see fit to award restitution to the tenant. Instructions to this effect are contained in O. P. A. Manual, Vol. 9, Section 6602.07 (e), issued on Dec. 23, 1946; adopted by the Housing Expediter, Rent Control Order No. 1, dated May 2, 1947, § 820.1 (b), 12 F. R. 2986. This instruction declared:

"Subject to the exceptions stated in paragraph (f) below, all complaints filed in court which include a count for treble damages, shall include a count providing for restitution to the tenant of the amount of the overcharges from the beginning of rent control to the date of the complaint. The prayer of such complaint shall contain a condition to the effect that if restitution shall be granted by the court for a portion or all of the overcharges included in the count for treble damages, the prayer for treble damages shall be reduced by the amount of the restitution so included."

Restitution was not sought in this case since it was instituted before this Court had decided *Porter* v. *Warner Co.*, 328 U. S. 395 (June 3, 1946), authoritatively establishing the right to restitution, and before the above instructions were issued (R. 1, Complaint filed Feb. 1, 1946).

[2] Feeling, as we do, that this Court should know the interests of its "friends," we are conscious of no impropriety in noting that three of the attorneys who have signed the brief

The purpose of the rent control legislation to protect tenants from excessive charges for housing would tend thus to be frustrated rather than furthered were the *amicus* position to be adopted. The error in that position, moreover, is made plain by an analysis of the contentions of the *amicus* in the light of the applicable provisions of the statute and the regulations.

A. *The contention that the gist of the violation is violation of the refund order, not violation of the rent reduction order.*—The *amicus'* argument in this respect is twofold: (1) that, under Section 205 (e), the only "overcharge" that will sustain an action "is a charge that 'exceeds' the maximum price 'applicable' at the instant it is made" (Br. 4), and (2) that the rent reduction order, without the refund order, "is prospective, not retroactive, in essence, scope and intent" (Br. 6). We shall deal with these arguments *seriatim*.

1. The short answer to the argument that there is no "overcharge" under Section 205 (e), unless

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amicus, professedly concerned primarily with the rights of tenants are counsel for the landlord in *Creedon* v. *Roupp*, D. Colo., No. 2224, an action much like that here involved. The attorneys for the defendant landlord are Messrs. Sherer, Melville, and Pringle. On November 6, 1947, Judge Symes granted the Expediter's motion for summary judgment in that action, but left for later determination the amount of damages. He held, also, that the landlord could be compelled, in a Section 205 (e) suit, to refund the overcharge to the tenant, the single amount of the overcharge there involved being approximately $9,000.

the charge exceeds the maximum applicable at the instant it is made, is that there is nothing in Section 205 (e) to support it. When defining the word "overcharge" in Section 205 (e), Congress could readily have provided that "the applicable maximum price" is the one in effect when the consideration is received. It did not do so; it simply used the word "applicable," and thus left it open to the Administrator to prescribe, as he did in Section 4 (e) of the Rent Regulation and, more specifically, in the order in the instant case, for retroactive applicability of a maximum fixed with respect to a landlord who has failed to file a registration statement. See Appendix to our main brief, p. 23. The question of the validity of that regulation and order is, of course, not open in this Court. Main Brief, pp. 15–16, note 4. That being so, the specification in the order here involved of the date of first rental as the effective date of the reduced maximum rent (R. 15) must be accepted as valid here.

The word "applicable" in Section 205 (e) cannot have one meaning for rent control and another for price. Yet the *amicus*, under the compulsion of substantial federal authority, seems to concede that treble damage suits may be based on retroactive pricing orders (Br. 9–10). She seeks to distinguish the line of authority in the price cases on the ground that the seller there knew or could have known his correct maximum price before he

sold, while here the landlord had "no conceivable means of knowing whether his maximum rent would later be reduced at all, or, if reduced, what the new figure would be." Br. 10. But the statement as to the landlord's inability to protect himself is completely untrue. All the landlord had to do was to file a registration statement; by so doing, he could have wholly avoided the entry of any retroactive rent reduction order, and thus been assured that the rent he was collecting was and would remain lawful. The landlord who inadvertently fails to file a registration statement is protected by that provision of Section 205 (e) which limits the liability to single damages or $25, whichever is greater, when the landlord can prove that his violation was neither "wilfull nor the result of a failure to take practicable precautions against the occurrence of the violation." See Appendix to main brief, p. 20.

In this connection, the *amicus* cites *Senderowitz* v. *Clark,* 162 F. 2d 912 (E. C. A.), as voiding the retroactive effect given to the order sued upon in *Porter* v. *Senderowitz,* 158 F. 2d 435 (C. C. A. 3), certiorari denied *sub nom. Senderowitz* v. *Fleming,* 330 U. S. 848. But in *Senderowitz* v. *Clark,* Judge Magruder, concurring, specifically pointed out the distinction between that case and the one here involved. He stated (162 F. 2d at 917):

> But the regulation did not specifically reserve to the Price Administrator the power

> to make any such adjustment order retroactive, to cover past sales, whether or not the reporting provision had been complied with on time. * * * The seller ought not to gain by a failure to make a timely compliance with the reporting provision, but it seems to have been a casus omissus in the regulation. In this respect the regulation is in marked contrast with the Rent Regulation for Housing. The rent regulation provides that, in the case of new housing accommodations first rented after the effective date of the regulation, the landlord's self-determined "first rent" shall become the maximum rent, subject to subsequent reduction by the Price Administrator to the level of the rents generally prevailing on the maximum rent date for comparable accommodations in the defense-rental area. There is also a reporting requirement in the rent regulation; but in that regulation the Price Administrator specifically reserves the power to make a subsequent reduction to the level of comparability retroactive if the landlord fails to comply with the reporting requirement, that is, fails to file a registration statement within 30 days after the first renting." See *150 East 47th Street Corp.* v. *Creedon,* Em. App. 1947, 162 F. 2d. 206.

And in the *150 East 47th Street Corp.* case, cited by Judge Magruder, which was decided eighteen days before *Senderowitz* v. *Clark,* the same judges who sat in the latter case upheld the

validity of a retroactive rent reduction order such as is here involved.[3] See also, *Easley* v. *Fleming*, 159 F. 2d 422 (E. C. A.); *Womack* v. *Bowles*, 146 F. 2d 497 (E. C. A.); *Ambassador Apartments* v. *Porter*, 157 F. 2d 774 (E. C. A.).

2. A mere reading of the rent reduction order, quite apart from the refund order, serves to rebut the *amicus'* contention that it is prospective "in essence, scope and effect." Before the word "refund" is mentioned, the rent reduction order expressly provides that it is "effective beginning" "From the date of such first renting * * *" (R. 15). Thus, even if there were no refund provisions in the order, the landlord would be liable to suit under Section 205 (e) for violation of the

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[3] In the *150 East 47th Street Corp.* case, the tenant had sought only to recover the single amount of the overcharge. But, as the record in that case shows, the tenant's action was one under § 205 (e) of the Price Control Act and was brought for single damages only because the tenant chose to do so. By its own terms, § 205 (a), under which the Expediter may sue to compel restitution, *Porter* v. *Warner Holding Co.*, 328 U. S. 395, does not authorize any action by a tenant. It provides:

"SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

order fixing a reduced maximum rent. The provisions in the Regulations with respect to refund orders merely supply an administrative device for tempering the effect of the retroactive rent reduction order. Section 4 (e) grants the landlord 30 days within which to comply with the refund order; if it is complied with, that is an end of the landlord's liability. Thus compliance with the refund order is the "last clear chance" accorded a landlord. But if he fails to take it, the refund provisions become irrelevant, and Section 205 (e) comes into play. What the *amicus* has sought to do is to elevate the refund provisions, an administrative act of grace, into a limitation on the statute itself.

C. *The contention that the Rent Regulation makes no provision for damages in the nature of penalties as a consequence of violation of a refund order.*—The *amicus* argues (Br. 7) that Section 4 (e) of the Rent Regulation (see Appendix to our main brief, p. 23) gives public notice to landlords who fail to file a registration statement that they may be subjected to a refund order if their maximum rent is subsequently decreased; she contends that this is the only consequence to which the attention of landlords is called and that, that being so, the Administrator cannot "thereafter seek to penalize them in three times the amount of the refunds". (Br. 7.)

In the first place, the liability of the landlord for damages is fixed by the Price Control Act, not by the Regulation. Even if the Regulation had provided no sanction for its violation, a landlord would be subject to all the sanctions provided by the Act. But the Rent Regulation, in its Section 10, does contain an express warning of treble damage liability in a situation like that at bar. It provides that "Persons violating any provision of this regulation are subject to criminal penalties, civil enforcement actions and *suits for treble damages as provided for by the Act.*" (Italics supplied.) 8 F. R. 14669, 10 F. R. 3443. Since Section 205 (e) provides for treble damage liability upon violation of a "regulation, order, or price schedule prescribing a maximum price or maximum prices" (Appendix to our main brief, p. 20), Section 10 of the Regulation must be read as contemplating treble damage liability for violation of the rent reduction order by failing or refusing to make the restitution required by the refund order. Indeed, in the case at bar, the respondent's attention was directed specifically to Section 205 (e) (R. 17).

We do not, of course, deny that Section 4 (e) of the Rent Regulation makes no mention of treble damage liability. As pointed out *supra*, p. 8, the refund provisions constitute an administrative mechanism through which landlords who

take advantage of their terms may limit their liability. But when, as here, there is a failure or refusal to comply with the refund order, there is for the first time a violation of the retroactive maximum rental reduction order (see our main brief, pp. 7–13), which brings into operation the provisions of Section 205 (e).

This regulatory scheme thus draws a sensible line between landlords who finally bring themselves into compliance by making the refund and those who fail or refuse to do so. The former are not subjected to treble damage liability; the latter, whose recalcitrance forces the tenant or the Expediter to institute suit, may be subjected to such liability.

There has been no variation in the administrative construction of the Rent Regulation as authorizing the entry of retroactive rent reduction orders which give rise to causes of action under Section 205 (e), if the landlord fails to take advantage of the refund option afforded him. And, in only two instances, has a court cast any doubt on the propriety of that construction.[4]

D. *The contention that the amicus view can prevent the landlord from gaining advantage from*

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[4] *Fleming* v. *Banks*, California Superior Court, decided October 3, 1947, petition for review denied by California Supreme Court, January 12, 1948 (the Superior Court opinion is reprinted as an Appendix to the *amicus* brief); and an unreported decision in *Stitzinger* v. *D. C. Improvement Co.*, Common Pleas, Cuyahoga County, Ohio, 1946.

his own wrong.—The *amicus* states that if "the wrongdoer is forced to give back that which he has obtained illicitly, the score is settled." (Br. 12.) But the fact is that Congress assumed the inadequacy of mere restitution, both as a means of "settling the score" with the tenant and in terms of enforcement needs, when it provided for treble damage actions.

When all is said and done, the *amicus* does not and cannot negate the fact that, under her view, a landlord who obeys the law and files a registration statement but then overcharges is liable to a treble damage assessment, but that a landlord who fails even to file a registration statement incurs no treble damage liability. This is a result which could be justified only under a statute and regulations which plainly permitted no other. That is not the situation here.

Respectfully submitted.

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